88- 1757

Supreme Court, U.S.
FILED
APR 22 1989
JOSEPH F. SPANIOL, JR.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

THE UNITED STATES,

Respondent,

v.

ALFRED D. COVATTO

Petitioner.

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3550
NO. 88-3617

THE UNITED STATES
v.
ALFRED D. COVATTO and
JOYCE M. COVATTO,

Appellants

Appeal from the Judgment of the
United States District Court for the
Western District of Pennsylvania
(D.C. Crim. No. 87-7 E)

District Judge: Honorable Glenn E. Mencer

Submitted Under Third Circuit Rule 12(6)
January 24, 1989

BEFORE: GIBBONS, Chief Judge, SEITZ, and GREENBERG, Circuit Judges.

(Filed: JAN 26, 1989)

MEMORANDUM OPINION OF THE COURT

SEITZ, Circuit Judge.

Appellants Alfred D. Covatto and Joyce M. Covatto appeal the judgment of sentence of the district court. The district court had jurisdiction under 28 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

I.

Alfred Covatto was one of the founders and the Chief Executive Officer of National Bancorporation (NBC). NBC had three subsidiaries, including First United Marketing Services Inc. (FUMS), which provided telemarketing services to banks to generate credit card accounts. Joyce Covatto, Alfred Covatto's wife, was a senior vice president of NBC in charge of the operation of FUMS.

In January 1984, NBC and its subsidiaries were purchased by and became a subsidiary of the First National Bank of Fryburg, Pennsylvania (later named First United National Bank of Fryburg, Pennsylvania

(FUNB)). Alfred Covatto was retained as the Chief Executive Officer of NBC, and Joyce Covatto continued to head FUMS.

The government alleged in the indictment and sought to prove at trial that after FUNB purchased NBC, the Covattos executed a scheme to defraud FUNB and aided and abetted the commission of this crime in three ways: (1) they caused FUNB to pay approximately $20,809 to Kim Mallin, the babysitter of the Covattos' children, by representing on NBC's records that NBC employed Mallin as a clerk, (2) Alfred Covatto caused FUNB to pay eleven checks, drawn on NBC accounts and issued to Covatto and others, in order to pay Alfred Covatto's personal expenses, and (3) they caused FUNB to pay three invoices, totalling over $151,000, as advances for work FUMS never performed for one of its customers, Marine Midland Bank, in violation of 18

U.S.C. §§ 1344 and 2 (Count One).

The government also sought to show that Alfred Covatto misapplied FUNB funds by causing FUNB to issue the eleven checks for Alfred Covatto's personal expenses, in violation of 18 U.S.C. § 565 (Counts 2-12). Finally, the government sought to show that Alfred Covatto misapplied FUNB funds by causing FUNB to pay the Covattos' babysitting expenses, in violation of 18 U.S.C. § 656, and that Joyce Covatto aided and abetted Alfred Covatto in the commission of this offense, in violation of 18 U.S.C. § 2 (Counts 14-49).[1]

Appellant's first trial ended in a mistrial when the jury could not reach a unanimous verdict. Following the second jury

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[1] Count 13, which alleged the misapplication of FUNB funds with respect to the issuance of one check to the Covattos' babysitter, was dismissed on appellants' motion prior to trial.

trial, appellants were convicted of Count One (the scheme to defraud) and Counts 14-47 (aiding and abetting and the misapplication of FUNB funds to pay the Covattos' babysitter). Alfred Covatto also was convicted of Counts 2, 3, 4, 8, 9, 11, 12 regarding the misapplication of FUNB funds in the issuance of seven checks to either himself or others. Appellants were sentenced and then took separate appeals. Alfred Covatto's appeal, at 88-3617, was consolidated with Joyce Covatto's appeal, at 88-3550.

II.

Appellants raise several issues in these appeals. First, appellants contend the district court erred in allowing the government to introduce evidence of Alfred Covatto's transactions with and disbursements of checks to third parties. Second, they raise the issue of prosecutorial misconduct during the

trial. In particular, Joyce Covatto argues that the district court erred in denying appellants' motion for a mistrial after the prosecutor elicited testimony from a director of the Office of the Comptroller of the Currency that he had "referred [this] matter to the authorities." Alfred Covatto contends that the prosecutor engaged in several acts of misconduct throughout the trial and in his closing argument. Finally, both appellants contend that there was insufficient evidence to support conviction.

A. Transactions With and Disbursements to Third Parties

Appellants contend that the district court erred in denying their motion to exclude evidence of Alfred Covatto's transactions with certain third parties, in violation of Fed.R.Evid. 402, 403, 404(b). We review the district court's decision to admit

this evidence under an abuse of discretion standard. United State v. Scarfo, 850 F.2d 1015, 1021 (3d Cir. 1988).

The evidence reveals that when FUNB purchased NBC in 1984, NBC owed Alfred Covatto $48,000 in "accrued compensation" or income Covatto had earned but not taken. FUNB paid Alfred Covatto $10,000 at the time of the purchase, but Covatto agreed to defer compensation of the remaining $38,000. After FUNB purchased NBC, Alfred Covatto wrote eleven checks on NBC's accounts, either to himself or to other persons. He claimed at trial that these checks represented part of the accrued compensation to which he was entitled.

The government was allowed to introduce evidence of the identity of the individuals to whom, and the purposes for which, the checks were written, including evidence that

appellant wrote checks either to James Willman or Cheryl Willman in order to persuade James Willman, an employee at Marine Midland Bank, to continue doing business with NBC.

Appellants argue that this evidence was inadmissible under Fed.R.Evid. 402 and 403 because it constituted Fed.R.Evid. 404(b) evidence of other crimes, particularly corporate bribery, which was highly prejudicial and not probative of any of the elements of the crimes charged in the indictment. They contend that the only issue at trial with respect to the eleven checks was whether Alfred Covatto justly believed he was entitled to issue the checks as part of his accrued compensation. Therefore, they urge that the way in which the funds were ultimately disbursed or used and Alfred Covatto's motive for disbursing the funds were irrelevant, citing Matters v. United States,

244 F. 736 (8th Cir. 1917). They also contend that the evidence of corporate bribery was prejudicial because it allowed the jury to convict appellants based on how the funds were used rather than on whether appellant was entitled to the funds as part of his accrued compensation.

The district court admitted the evidence to prove motive and/or part of the overall scheme to defraud alleged in the indictment. We conclude that the district court did not abuse its discretion in admitting the evidence and that the evidence satisfies the test of Fed.R.Evid. 403. The evidence, while prejudicial, was probative of the issue whether Alfred Covatto issued the checks intending in good faith that they be part payment of his deferred compensation or whether he instead issued the checks for some purpose other than satisfying the outstanding

deferred compensation. The high probative value of the evidence is indicated by the fact that the jury acquitted Alfred Covatto of misapplying FUNB funds on counts involving checks which were written to himself and were inscribed with memoranda that the checks were used for deferred compensation and convicted appellant of counts involving checks which were written to third parties and were inscribed with memoranda indicating their use for some purpose other than deferred compensation.

B. Prosecutorial Misconduct

1. The Motion for Mistrial

Appellants contend that the district court erred in denying appellants' motion for a mistrial after the prosecutor elicited testimony from David Hammaker, a regional director of the Comptroller of the Currency, that after conducting an examination of FUNB

in September 1985 he "referred the matter to the authorities." The district court had instructed the prosecutor only minutes earlier not to refer to the fact that Hammaker had made a referral to criminal authorities. We review the district court's denial of a motion for a mistrial under the abuse of discretion standard. United States v. De Rosa, 548 F.2d 464, 473 (3d Cir. 1977). In considering whether the district court should have granted the motion, we focus on the possibility of prejudice to the defendant. Id.

After reviewing the entire transcript of this trial, particularly considering the content of the testimony and the context in which it arose, we conclude the district court did not abuse its discretion in denying the motion. Although we do not condone the prosecutor's careless conduct, based on our

review of the record, we disagree with Joyce Covatto that this testimony left the jury with no other conclusion than that Hammaker believed appellants had committed a criminal offense.

2. Other Prosecutorial Misconduct

Alfred Covatto contends that the prosecutor's misconduct in this case was so pervasive as to deny Covatto a fair trial. In particular, he contends that the prosecutor overemphasized the bribery evidence, spoke so loudly at sidebar conferences that the jury overheard, mischaracterized evidence and made improper arguments to the jury.

We will assume that appellant preserved this issue for appeal. In evaluating the prosecutor's conduct, we must decide "'whether [his] remarks, in the context of the entire trial, were sufficiently prejudicial to violate defendant's due process rights.'"

United States v. Adams, 759 F.2d 1099, 1111 (3d Cir. 1985) (citation omitted).

After reviewing the entire transcript, we conclude that the prosecutor's conduct, while certainly less than praiseworthy, was not so improper as to warrant reversal of appellants' conviction. We cannot discern from the record that the jury overheard the prosecutor's comments at sidebar conferences, and both the prosecutor and the court informed the jury that the prosecutor's comments were not evidence in the case. Appellant cites to many portions of the transcript for instances of prosecutorial misconduct during the trial. After reviewing the trial transcript, we are satisfied that the instances of alleged prosecutorial misconduct were not sufficiently prejudicial that they violated the right to due process.

C. Sufficiency of the Evidence

Appellants contend that there was insufficient evidence to support their convictions. Our standard of review requires us to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Skulsky, 786 F.2d 558, 563 (2d Cir. 1986). This standard is identical to that applied by the district court in ruling on a motion for judgment of acquittal. United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987). Accordingly, our scope of review is plenary.

In order to prove a violation of 18 U.S.C. § 1344, the government must show that the defendant knowingly (1) engaged in a scheme to defraud a federally insured financial institution, or (2) participated in a scheme to obtain money under the custody or

control of the financial institution by means of false statements or representations. United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987). "Scheme" is defined to include "any plan, pattern or cause of action, including false and fraudulent pretenses and misrepresentation, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived"; "fraud" is measured by determining whether the scheme "demonstrated a departure from fundamental honesty, oral uprightness, or fair play and candid dealings in the general life of the community." Id. at 624.

In order to prove a violation of 18 U.S.C. § 656, the government must show: (1) the bank was national in character, (2) the defendant was an officer of the bank, (3) the defendant willfully misapplied bank funds, credits, or moneys, and (4) the defendant

acted with intent to defraud the bank. United States v. Thomas, 610 F.2d 1166, 1174 (3d Cir. 1979). Intent to defraud exists if the officer acts "knowingly and if the natural result of his conduct would be to injure and defraud the bank even though this may not have been his motive;" such intent may be inferred from the facts and circumstances shown at trial and is basically a fact for the jury. Id. The element of misapplication requires proof of conversion of bank funds, credits or moneys. Id.

In order to prove a violation of 18 U.S.C. §§ 2 and 656 on Joyce Covatto's part, the government had to show that the substantive offense of misapplication occurred and that Joyce Covatto intentionally facilitated the violation of 18 U.S.C. § 656. See United States v. Cades, 495 F.2d 1166, 1168 (3d Cir. 1974).

The government's evidence tended to show: (1) Mallin, the Covattos' babysitter, was on [sic] listed on NBC's records and payroll as a clerk, but never did any clerical work for NBC, (2) Alfred Covatto told Mallin she was a "domestic investigator;" upon Mallin's request for a raise, Joyce Covatto told Mallin she might have to learn some function at the bank in case FUNB inquired about the reason for the raise, (3) aside from former members of NBC's Board of Directors, no one at FUNB, including its chief executive officer, knew that Mallin was being paid to watch the Covattos' children, (4) Alfred Covatto drew two checks on NBC accounts to pay the college tuition of Cheryl Tillman, with no indication that they were part of accrued compensation, (5) Alfred Covatto drew one check on an NBC account in order to purchase a truck for James Willman,

indicating on the check that it was for "truck purchase," (6) Alfred Covatto drew three checks on NBC accounts to pay William Trice a commission for obtaining loans which he did not obtain, (7) someone from NBC drew up a list of all payments constituting repayment of Alfred Covatto's accrued compensation, which included the aforementioned checks, but there is no evidence as to when this list was created, and FUNB received a copy of the list only after it began its audit of NBC, (8) NBC, through FUMS, submitted three invoices to its customer Marine Midland Bank for an advance for telemarketing and other services which were not described in the invoices, (9) pursuant to an established procedure, FUNB credited NBC accounts in the amounts of the invoices to be reimbursed by Marine Midland Bank once NBC had completed the work, (10) Marine Midland

never paid FUNB in the amount of the invoices, and the work was never completed, (11) documentation to support payment of the invoices could not be found in Marine Midland's records or in FUMS' records, and the Covattos were unable to supply documentation for the invoices upon request, (12) Alfred Covatto told an investigator from the Federal Bureau of Investigation that he could supply the documentation from the invoices but did not do so, (13) Alfred Covatto indicated he would cover one of the invoices, in the amount of $60,000, with a check from an account in Florida, but monies from the Florida account were deposited into NBC's account and never credited to FUNB to cover the invoice, (13) the Covattos were ultimately responsible for the invoices since Alfred Covatto was the president of NBC and Joyce Covatto was in charge of FUMS.

We conclude that the government's evidence, while circumstantial, was sufficient to allow a rational trier of fact to find the elements of the crimes charged beyond a reasonable doubt.

III.

In light of the foregoing, we will affirm the judgment of the district court.

To the Clerk of the Court:

Please file the foregoing memorandum opinion.

s/s
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3550
NO. 88-3617

THE UNITED STATES

v.

ALFRED D. COVATTO and
JOYCE M. COVATTO,

Appellants

Appeal from the Judgment of the
United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 87-7 E)

BEFORE: GIBBONS, Chief Judge, SEITZ, and GREENBERG, Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and

was submitted under Third Circuit Rule 12(6) on January 24, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the district court entered on August 15, 1987 and September 7, 1987 be and the same are hereby affirmed.

ATTEST:

s/s
Clerk

JAN 26, 1989

Nos. 88-3550 & 88-3617

Certified as a true copy and issued in lieu of a formal mandate on March 1, 1989.

Test: s/s

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3550
NO. 88-3617

THE UNITED STATES

v.

ALFRED D. COVATTO and
JOYCE M. COVATTO,

Appellants

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 87-7 E)

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, Circuit Judges.

The petitions for rehearing filed by Joyce M. Covatto, appellant in No. 88-3550 and Alfred D. Covatto, appellant in No. 88-3617, in the above captioned matters having been submitted to the judges who participated

in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court

DATED: FEB 21 1989

s/s
Circuit Judge

BIANCHI SELIGSON LINCOLN MERCURY, INC., Plaintiff	:	IN THE COURT OF COMMON PLEAS
V.	:	OF ERIE COUNTY, PENNSYLVANIA
NATIONAL BANCORPORATION and FIRST UNITED NATIONAL BANK,	:	CIVIL ACTION-LAW
V.	:	
ALFRED COVATTO, Additional Defendant:	:	NO. 670-A-1986

O P I N I O N

Joyce, J., November 9, 1988

This matter is before the Court for a determination of issues incident to the Complaint against Additional Defendant filed by National Bancorporation and First United National Bank, Defendants, for breach of contract relating to the lease and use by Additional Defendant, Alfred D. Covatto, of a 1984 Lincoln Town Car automobile during his employment under contract with Defendants.

The principle issue faced by the Court

in this action concerns the authority of Additional Defendant, Alfred D. Covatto ("Covatto"), to enter into a vehicle lease agreement with Plaintiff.

Covatto originally, with his wife, owned 100% of the outstanding stock of National Bancorporation ("National") and held the position of Chief Executive Officer. Covatto caused to be executed between himself and National an Executive Employment Agreement for purposes of securing and defining his employment status, including recitations of duties and benefits involved in the position of Chief Executive Officer. Upon the subsequent acquisition of the 100% of the common stock of National by First United National Bank ("First"), the Board of Directors of First executed a ratification agreement between itself and Covatto ratifying the aforementioned Executive Employment Agreement. Of

particular interest in this instant action is paragraph number 8 entitled "Vacation and Other Matters" (page 6, Executive Employment Agreement), subparagraph 2 stating "[e]mployee shall be entitled to a new automobile each third year (Lincoln or equivalent) . . . ."

At the time of the acquisition, Covatto was leasing a 1982 Lincoln through one of his corporations, but not through the acquired National. This lease was between Plaintiff and a corporation unrelated to the corporate acquisition underlying the instant action. As such, its existence has no bearing on the present controversy. As a direct result of this finding, the Court must conclude that the leasing by Covatto of the 1984 Lincoln was the first leasing of a "Lincoln or equivalent" under the ratified Executive Employment Agreement. This agreement clearly

sets forth the right of Covatto to such an automobile with the only exception being that this right is exercisable once every three years. Since this Court finds that the 1984 lease was the first such lease under the new agreement, the court is compelled to further find that this lease is expressly authorized by the agreement. The clear and unambiguous language is unassailable. Webster's Third New International Dictionary defines 'entitled' as giving "a right or legal title to" and "[to] furnish with proper grounds for seeking or claiming something." Webster's Third New Int'l Dictionary 758 (3d ed. 1976). Covatto, by virtue of the language of his own instrument, creates in the court's opinion a situation whereby every three years First could have been legally compelled to provide Covatto with a new vehicle and to vest in him all rights and title to such vehicle to the

exclusion of all others, including First.

Given the foregoing, it is of no importance why Covatto turned in the 1982 Lincoln, rather it matters only that he did lease the 1984 Lincoln. This brings the court to the question of whether Covatto had the power by himself to execute the agreement to lease the vehicle or whether, despite his entitlement, it was upon the direction of the Board of Directors only that such a transaction should be effected.

Defendants, National and First, argue that Covatto was without authority to enter into the 1984 lease agreement on his own initiative and as a result, is liable to defendants for all amounts expended as a result of Covatto's use of this automobile.

Covatto's position as an employee of the newly acquired entity substantially parallels that of his executive status at the original

National Bancorporation. The duties and powers exercised in each of the two employment situations involved substantial control over ordinary and everyday business operations to the point that ultimate decisions concerning everyday business were within Covatto's control. These facts were repeatedly brought out during a hearing held September 28, 1988, on this matter and are a part of the permanent record.

Covatto himself could, therefore, execute any function that was within the lawful power of the board of directors subject only to the "ordinary course of business" standard. See, Renault v. L.N. Renault and Sons, 188 F.2d 317(3d Cir. 1951). In the present situation, it is undisputed that First was able to lease vehicles for its officers if it so desired. Testimony during the instant hearing established that employees of First

and National did travel from time to time on corporation business. It appears quite clearly to the Court that the lease, acquisition and use of an automobile may certainly be considered within the ordinary course of the business of a corporation having extensive ties to various businesses and localities at some distance from a corporate division's "home base". Further, it appears that this is the situation in the case at bar.

The fact that Covatto was given almost unrestrained control over his facet of the entire business operation by the Board of Directors from the moment of the acquisition of National by First, further requires the legal result that he must have assumed any and all powers with which the Board could have endowed him. An agent invested with substantial control over a business must have power available to him to preserve his prin-

cipal's interest. This result is only strengthened by the fact that Covatto appears to have been very actively involved in the operations of the business itself. It is axiomatic that the active, "front line" portion of any business, not the board of directors, must have the primary authority and responsibility for accomplishing the business of any corporation.

The extent to which an officer or employee of a corporation may extend his authority is inextricably tied to the facts of the surrounding situation. The instant matter, once again, presents us with the situation of an executive officer invested with almost plenary authority over an enterprise's operations. Covatto was also subject to an executive employment contract that stated clearly that he was "entitled" to a Lincoln or similar style automobile. This contract was

ratified by the acquiring corporation, First. Even further, the record clearly shows that First knew either directly, by virtue of the physical presence of new car, or constructively, by virtue of the accounting audit, that a new vehicle lease existed. Thus, the Court must conclude that either Covatto had direct authority through the Executive Employment Agreement and the extent of his control over operations or he had implied authority by virtue of the defendants not objecting to these actions once they became aware of them. In either case, the result is the same.

Defendants, in objecting to the characterization of Covatto as having implied authority by virtue of their inaction after becoming aware of the existence of the 1984 Lincoln, argues that although they knew of the change of automobiles they believe that

the 1984 Lincoln was merely a substituted vehicle under the 1982 lease. The court cannot accept this argument. Each of the Defendants is a financial services corporation involved to a significant degree in commercial lending. It is an integral part of their business to secure and protect their proprietary interest and this is done extensively by virtue of legal instruments. It would be unheard of for such an institution to swap collateral on one of their own loans without a corresponding swapping of legal instruments. Defendants cannot reasonably rely on the position that another entity involved extensively in the leasing of vehicles would permit any vehicle to leave their possession without the execution of a separate and unique security and lease agreement.

Based upon the above considerations,

this Court has no alternative but to hold for Additional Defendant, Alfred Covatto, and against original Defendants, National Bancorporation and First United National Bank.

BY THE COURT:

s/s
MICHAEL T. JOYCE, JUDGE

cc: Henry Ray Pope, III, Esq.
Richard A. Vendetti, Esq.